

VIRGINIA:

FILED
CRIMINAL

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

HON. J. FREY
CIRCUIT COURT
FAIRFAX, VA

v.

CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

**MOTION TO REQUIRE THE COMMONWEALTH TO PROVIDE TO THE
DEFENSE EXCULPATORY EVIDENCE AS TO DEFENDANT LEE MALVO BEING
REQUIRED TO RECEIVE MILITARY TRAINING**

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and states as follows:

1. Counsel for the defendant are aware that the Commonwealth, through its Task Force law enforcement agents, has interviewed a military retiree who was secured by John Muhammad to assist John Muhammad in training Lee Boyd Malvo in use of weapons and military tactics.
2. It is believed that same witness has turned over to authorities or identified to authorities weapons he loaned to or secured for John Muhammad.
3. To the knowledge and belief of counsel for the defendant, the Commonwealth is in possession of information that John Muhammad required Lee Boyd Malvo to be trained on computer programs which simulated military actions and were intended to desensitize him.
4. That there may be additional witnesses known to and interviewed by the Commonwealth who have provided further information as to this training.
5. That such evidence relates directly to the role of each defendant, and the degree of

culpability of each.

6. That such evidence is exculpatory, relevant, and material to the defense of Lee Boyd Malvo in both the merits phase and, should it be reached, any penalty phase.

7. That such exculpatory evidence is included in the Court's Order dated March 3, 2003 which has been previously entered by this Court.

WHEREFORE, the defendant by counsel, respectfully moves this honorable Court to enter an Order requiring the Commonwealth to provide to the defense this information, its sources, and the name and current address of any witness who provided this exculpatory information.

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

151

and

By _____
Co-Counsel

151

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road
Suite 105
Springfield, VA 22151
703-323-1200
703-978-1040 (Fax)
VSB No: 20999

Craig S. Cooley, Esquire
3000 Idlewood Avenue
P. O. Box 7268
Richmond, VA 23221
804-358-2328
804-358-3947(Fax)
VSB No: 16593

CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed,
first class mail to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 3rd day of July, 2003.

151
Co-Counsel

151
Co-Counsel

VIRGINIA:

FILED
CRIMINAL

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

LEE BOYD MALVO,

Defendant.

Criminal No. 102888

NOTICE AND MOTION TO SUPPRESS

PLEASE TAKE NOTICE that on the 24th day of July, 2003 at 10:00 a.m., the Defendant Lee Malvo, by and through counsel, will move this Court to suppress statements allegedly made by Defendant to law enforcement officials. In support of his Motion, Defendant respectfully refers the Court to his Memorandum of Points and Authorities, filed herewith.

Respectfully submitted,
LEE BOYD MALVO

By 151
Co-Counsel

and

By 151
Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road, Suite 105
Springfield, VA 22151
703-323-1200
703-978-1040 Fax
VSB No. 20999

Craig S. Cooley, Esquire
3000 Idlewood Avenue
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Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 3rd day of July, 2003.

151

Co-Counsel

151

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,)	
)	
v.)	CRIMINAL NO. 102888
)	
LEE BOYD MALVO,)	
Defendant.)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS

I. Facts

On October 24, 2002 at approximately 1:00 a.m. Defendant Lee Malvo and John Allen Muhammad were arrested in Myersville, Maryland. The authority for Lee Malvo's arrest was a Federal Material Witness Warrant which had been issued the previous day based upon the suspicion that Lee Malvo was involved in a number shootings occurring in and around the Washington, D.C. area over the prior three weeks. (See Exhibit 1). Following his arrest, Lee Malvo was eventually taken to the MPC Family Services Division in Rockville, Maryland, where authorities began attempts to interrogate him at approximately 9:40 a.m. on October 24, 2002.

When initially approached by interrogators, Lee Malvo gestured with his hands by putting his fingers to his lips and making "a zipper motion repeatedly." (See exhibit 2). He was then advised of his rights and presented with a written form listing those rights. Lee Malvo remained silent, and when asked if he wanted to speak to authorities, he moved his head side to side, responding that he did not. Lee Malvo's responses were memorialized on the "advice of rights" form. (See exhibit 3). Despite Lee Malvo's invocation of his right to remain silent, authorities did not honor that right and continued to interrogate him for a total of more than three hours: (a

video tape of the “second phase” of this continued interrogation is available for the Court if necessary). During the questioning, Lee Malvo remained silent (although he intermittently responded by shrugging many times, changing his facial expressions and making occasional gestures which the interrogator subjectively interpreted). After these attempts to interrogate him failed, Lee Malvo was turned over to federal authorities and transported to a “Super Max” corrections facility to await his initial appearance in the United States District Court for the District of Maryland (in Baltimore).

On the same day, October 24, 2002, at approximately 3:00 p.m., Lee Malvo was brought before a Magistrate Judge in the District of Maryland, Baltimore Division for his initial appearance. In the course of that proceeding, Max Lauten, Esquire and Andrew Graham, Esquire were appointed as Guardians *ad litem* for Lee Malvo, and Joshua Treem, Esquire was appointed as defense counsel. Shortly thereafter, the Judge advised Lee Malvo of his right to remain silent and to have counsel present at every stage of the proceedings, including during any questioning by law enforcement. Lee Malvo maintained his silence for the duration of the hearing, invoking his rights accordingly. In fact, his continued silence was addressed on the record, as Magistrate Judge Bredar attempted to clarify whether or not Lee Malvo understood English. In response to the Judge’s inquiry, the Assistant United States Attorney stated that Lee Malvo had earlier nodded and appeared to understand police “when he was interviewed” at the MPC Family Services Division. (See Exhibit 2).

After this initial appearance in court, Lee Malvo was transported back to the Super Max facility and held in isolation over the objection of his defense counsel. (See Exhibit 2). The only access Lee Malvo had to anything outside the confines of his cell was through the slot in the door,

designed for passing food through. The only exposure Lee Malvo had to any other human beings was to the guards who delivered his food, or thus, watched his cell continuously.

According to an incomplete, summarized “substance of oral statement” ostensibly prepared by a third party on behalf of Captain Joseph Stracke, while in the Super Max facility, Lee Malvo continued to remain silent, and at some point on October 25, 2002, apparently became hungry. He gestured as though he wanted some of the food he noticed that Corporal Wayne Davis was eating, but did not speak. At that time, Captain Joseph Stracke told Lee Malvo that if he wanted something he would “*have to ask for it*”. Lee Malvo then stated he would like some fish. He was given some fish by Corporal Davis and at that point, without regard for Lee Malvo’s status as a represented detainee, nor for his previous invocation of his Fifth and Sixth Amendment rights, Captain Stracke began to question Lee Malvo regarding the “sniper shootings” and an effort to elicit incriminating information. At no time was he read his *Miranda* warnings, asked if he would prefer to have counsel present, nor asked if he would waive his rights.

According to another incomplete, summarized “substance of oral statement” ostensibly prepared by a third party on behalf of Corporal Wayne Davis, on another occasion, on or about the same day, he observed Lee Malvo walking around in his cell and looking at the ceiling. Davis stated “Whatever you’re thinking you can forget it.” Lee Malvo simply responded with “You watch too much news.” Davis retorted, saying that perhaps Lee Malvo should have watched more news, and continued with an interrogation, during which Lee Malvo is again alleged to have provided information about various shootings in the D.C. Metropolitan area. Again, Lee Malvo was not read his *Miranda* warnings, offered counsel, nor asked to waive his rights in any manner.

II. Juveniles Are Afforded an Increased Level Of Protection From Violations of Their Constitutional Rights During Police Interrogations.

The United States Supreme Court has long recognized the need for additional scrutiny when analyzing whether the constitutional rights of a juvenile have been violated. For example, in Gallegos v. Colorado, 370 U.S. 49, 54 (1962), the Court stated that

[the juvenile defendant] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights - from someone concerned with securing him those rights - and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not.

While a “totality of the circumstances” analysis applies in juvenile cases as well as adult cases, the factors and circumstances to be evaluated are not the same. Factors that are uniquely considered in juvenile cases include

[t]he youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of lawyer or a friend - all of these combine to make us conclude that the formal confession on which this conviction may have rested (see Payne v. Arkansas, 356 U.S. 560, 568) was obtained in violation of due process.

Id. at 56. The United States Supreme Court has also noted and emphasized inherent distinctions between juveniles and adults when considering the validity of confessions. “With respect to juveniles, both common observation and expert opinion emphasize that the ‘distrust of confessions made in certain situations’ [alluded to elsewhere in the opinion], is imperative in the case of children from an early age through adolescence.” In Re Gault, 387 U.S. 1, 48 (1967).

The special consideration given juvenile confessions and the related constitutional issues has been well established by the Virginia courts as well. In deciding Grogg v. Commonwealth, 6 Va. App. 598 (1988), the Virginia Court of Appeals recognized the added care necessary in determining whether juveniles' statements made while in custody are voluntary.

As the Supreme Court held in *Gault*, 'the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.' 387 U.S. at 55; *see also Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948); *Williams v. Peyton*, 404 F.2d 528, 530-31 (4th Cir. 1968).

Grogg, 6 Va.App. at 612-13. The Grogg court also addressed the importance of having someone there to assist a juvenile in a setting where police are applying pressure to obtain incriminating statements.

We hold that, in the case of a juvenile, the presence or absence of a parent, guardian, independent interested adult, or counsel is a circumstance and factor to be considered in the totality of the circumstances when determining whether a waiver is knowing and intelligent. The absence of a parent or counsel is 'a circumstance that weigh[s] against the admissibility of the confession.' *Miller v. Maryland*, 577 F.2d 1158, 1159 (4th Cir. 1978).

Id. at 613.

III. The Juvenile Lee Malvo's Rights Under the Fifth Amendment to the United States Constitution, As Interpreted by Miranda, Were Violated On Multiple Occasions While He Was In Custody in Maryland.

- A. Miranda requires the giving of Miranda warnings and the waiver of Miranda rights before any statement by the accused without his attorney present may be admitted as part of the prosecution's case in chief.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court concluded that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals." 384 U.S. at 455. In order to dispel the coercion inherent in such

questioning the Court mandated that prior to any custodial interrogation the suspect must receive the now familiar Miranda warnings, that the interrogation must cease if the individual “indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent,” and that the interrogation must cease if the individual states he wants an attorney. Id. at 474; see also, Quinn v. Commonwealth, 25 Va. App. 702, 492 S.E.2d 470 (1997). These mandates were reaffirmed as the Constitutional law of the land under the Fifth Amendment right against self incrimination by the Court in Dickerson v. United States, 530 U.S. 428, 444 (2000).

An invocation of the right to silence must be scrupulously honored, and interrogators may not take advantage of an opportunity to coerce an oral response from a suspect. Michigan v. Mosley, 423 U.S. 96, 104 (1975). After an individual indicates, in any manner, that he wishes to remain silent, “officers can reinitiate questioning only if: (1) at the time the defendant invoked his right to remain silent, the questioning ceased; (2) a substantial interval passed before the second interrogation; (3) the defendant was given a fresh set of Miranda warnings; and (4) the subject of the second interrogation was unrelated to the first.” United States v. Glover, 104 F.3d 1570, 1580 (10th Cir. 1997) (citing Mosley, 423 U.S. at 104-105).

For the requirements of Miranda to apply there must be a “custodial interrogation.” An individual is in custody where there has been either a formal arrest or a “restraint on freedom of movement of the degree associated with a formal arrest.” New York v. Quarles, 467 U.S. 649, 655 (1984). Interrogation includes not simply formal questioning but also “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Rhode Island v. Innis, 446 U.S. 291, 301 (1980). The interrogator need not be a police officer,

per se; the requirements of Miranda apply to other “government agents” as well. Mathis v. United States, 391 U.S. 1, 4 (1968); United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995). In Virginia, the issue of interrogation has been stated as whether an “objective observer... would view an officer’s words or actions as designed to elicit an incriminating response.” Timbers v. Commonwealth, 28 Va. App. 187, 198, 503 S.E.2d 233 (1998).

Finally, for a statement to be admissible, the burden is on the prosecution to prove a knowing, intelligent, and voluntary waiver of the accused’s rights under Miranda.

- B. Because police interrogation continued without a waiver of the right to counsel, and after an invocation of the right to silence, the juvenile Lee Malvo’s alleged gestures—which were interpreted by his interrogator as statements—made on October 24, 2002 to Detective T. Ryan in a Montgomery County Police interview room must be suppressed.

The juvenile Lee Malvo was subjected to custodial interrogation on October 24, 2002. He had been under formal arrest since the very early morning hours. He was placed in a secured interview room and asked direct questions regarding the allegations leading to his arrest. Thus, the interrogating police officer was required to comply with the requirements of Miranda. See Miranda v. Arizona, 384 U.S. 436 (1966). The officer did not.

Before reading the juvenile Malvo his Miranda rights, the officer asked formal questions that the officer should have known were likely to elicit an incriminating response. At that time Malvo, without speaking, invoked his right to silence with a zipping of the lips motion. He further confirmed his clear desire to remain silent with head nods. The Supreme Court of the United States is absolutely clear as to what should have happened at this point: “the interrogation must cease.” Miranda, 384 U.S. at 474.

Instead, the officer proceeded with the interrogation. The officer presented the Miranda

warnings and asked the juvenile Malvo whether he wished to waive the right to silence he had just invoked—a clear violation of the officer’s duty to scrupulously honor Malvo’s right to remain silent. See Mosley, 423 U.S. at 104. Despite this coercive effort, Malvo refused to waive either his right to counsel or his right to silence. The interrogation had reached a second point where it was clear that it “must cease.” Yet the officer continued, asking a series of formal questions clearly designed to elicit incriminating responses. Malvo’s only response was in the form of gestures, that the interrogator recorded and subjectively interpreted as statements.

Accordingly, all evidence of gestures, statements, or gestures interpreted as statements arising from the October 24th, 2002 interrogation of the juvenile Lee Malvo by the Montgomery County Police must be suppressed in this case because it was obtained in clear violation of the Fifth Amendment under Miranda v. Arizona, 384 U.S. 436 (1966).

- C. The juvenile Lee Malvo’s Fifth Amendment rights under Miranda were violated when he was interrogated by Corporal Wayne Davis in the Baltimore Super Max Federal Prison on October 25th, 2002 without respect for Malvo’s invocation of his right to remain silent, without Miranda warnings, and without a waiver of his right to counsel or his right to remain silent.

The juvenile Lee Malvo was subjected to custodial interrogation by Corporal Wayne Davis on or about October 25th, 2002. Under formal arrest and detained in a prison, Malvo was clearly in the custody of the government. Corporal Davis is an agent of the government for the purposes of Miranda. Preying on the juvenile’s vulnerability, Corporal Davis both engaged in actions and formal questioning that an objective observer would conclude were designed to elicit an incriminating response from Malvo.

Thus, Miranda applied and any statements made by Malvo in response to this interrogation are inadmissible unless Corporal Davis complied with the Constitutional requirements of that

decision. He did not. First and foremost, Corporal Davis did not scrupulously honor Malvo's invocation of his right to silence. Having been invoked the previous day, Davis could interrogate Malvo only if four conditions were met: "(1) at the time the defendant invoked his right to remain silent, the questioning ceased; (2) a substantial interval passed before the second interrogation; (3) the defendant was given a fresh set of Miranda warnings; and (4) the subject of the second interrogation was unrelated to the first." United States v. Glover, 104 F.3d 1570, 1580 (10th Cir. 1997) (citing Mosley, 423 U.S. at 104-105).

An examination of the first condition, which requires that the officer in Montgomery County end the interrogation at the point Malvo invoked his right to silence, demonstrates that absolutely nothing Davis did could remove the Constitutional taint caused by the officer in Montgomery County's refusal to honor Malvo's invocation of his right to silence.

In fact, of the four requirements needed to scrupulously honor an individual's invocation of his right to silence, three have not been met here. In addition to the fact that in Montgomery County the interrogation did not cease after the right was invoked, Davis did not give Malvo a fresh set of Miranda warnings, and the subjects of the two interrogations were identical.

Putting aside the taint caused by the Montgomery County interrogation, Davis did not comply with the requirements of Miranda in three distinct ways: Davis did not read Malvo his Miranda rights, Malvo did not waive his right to counsel, and Malvo did not waive his right to remain silent.

As the result of multiple violations of the Fifth Amendment as interpreted by Miranda, any and all statements made by the juvenile Lee Malvo to Corporal Wayne Davis in the Baltimore Super Max Prison must be suppressed as evidence in this case.

- D. The juvenile Lee Malvo's Fifth Amendment rights under Miranda were violated when he was interrogated by Corporal Wayne Davis and Captain Joseph Stracke in the Baltimore Super Max Federal Prison on October 26th, 2002 without respect for Malvo's invocation of his right to remain silent, without Miranda warnings, and without a waiver of his right to counsel or his right to remain silent.

Lee Malvo was subjected to a second custodial interrogation at the Baltimore Super Max Prison on or about October 26th, 2002. On this occasion, Corporal Davis was joined by Captain Joseph Stracke. Apart from the addition of a second interrogator, the events that followed were identical in all material respects to the previous day's interrogation. Malvo was in custody. Two agents of the government engaged in actions and asked formal questions that an objective observer would conclude were designed to elicit an incriminating response from Malvo.

Once again Miranda applied, and once again it was ignored. No intervening event had purged the taint resulting from Montgomery County Police Detective Ryan's refusal to cease interrogation after Malvo invoked his right to silence. Thus, it was impossible under Mosley for Davis and Stracke to constitutionally interrogate Malvo. Again, the defendant was not given a fresh set of Miranda warnings, and again the subject of this third interrogation was identical to that of the tainted first.

Addressing this third interrogation in isolation, Davis and Strake did not comply with Miranda. Neither Davis nor Stracke read Malvo his Miranda rights, Malvo did not waive his right to counsel, and Malvo did not waive his right to remain silent.

Any and all statements made by Lee Malvo during this repeat of the circumstances of the interrogation by Davis alone must also be suppressed as a violation of the Fifth Amendment as interpreted by Miranda.

IV. Any and all statements made by the juvenile Lee Malvo while in custody in Maryland must be suppressed as involuntary under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Under the Fifth and Fourteenth Amendments to the Constitution due process of law requires that statements cannot be admitted if they are involuntary. “‘It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. Equally clear is the defendant’s constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.” Jackson v. Denno, 378 U.S. 368, 376-77 (1964) (citations omitted).

In order to use Lee Malvo’s statements for any purpose at trial, the Commonwealth must prove by a preponderance of the evidence that the confession was voluntary. See, Lego v. Twomey, 404 U.S. 477, 489 (1972). This Court must examine “whether the statement was the ‘product of an essentially free and unconstrained choice by its maker,’ or whether the maker’s will ‘has been overborne and his capacity for self-determination critically impaired.’” Bottenfield v. Commonwealth, 25 Va. App. 316, 323, 487 S.E.2d 883 (1997) (quoting Commonwealth v. Peterson, 15 Va. App. 486, 487-88, 424 S.E.2d 722, 723 (1992)).

In determining the voluntariness of the statements, this Court considers the “totality of the circumstances.” E.g., Rodgers v. Commonwealth, 227 Va. 605, 609, 318 S.E.2d 298, 300 (1984). “In examining the totality of the circumstances surrounding a [statement], a court must consider a myriad of factors, including the defendant’s age, intelligence, background and experience with the criminal justice system, the purpose and flagrancy of any police misconduct,

and the length of the interview.” Mundy v. Commonwealth, 11 Va. App. 461, 476, 390 S.E.2d 525 (1990) (en banc). Other factors that have been considered significant include: the individual’s short stature and slight build, the nature of the crime alleged and it’s impact on the individual’s safety in prison, the individual’s adaptation to the custodial setting, and the ability of an interrogator posing as a friend to play on an individual’s susceptibility. See Arizona v. Fulminante, 499 U.S. 279, 286 (1991).

All statements allegedly made by the juvenile Lee Malvo were involuntarily made and must be suppressed as evidence in this case. Each interrogator engaged in coercive conduct that was sufficient to overcome the will of the juvenile given his particular vulnerabilities and the conditions of the interrogation. Therefore, any and all statements by Lee Malvo while in custody in Maryland must be suppressed as evidence in this case under the Due Process Clauses of the Fifth and Fourteenth Amendments.

V. Lee Malvo’s Six Amendment Rights Were Violated.

A. LEGAL BACKGROUND

The United States Supreme Court has stated, the “Sixth Amendment guarantees the accused, at least after initiation of formal charges, the right to rely on counsel as a ‘medium’ between him and the State.” Maine v. Moulton, 474 U.S. 159, 176 (1985). Its purpose “is to protect the unaided layman at critical confrontations with his expert adversary, the government, after the adverse positions of government and defendant have solidified with respect to a particular alleged crime.” McNeil v. Wisconsin, 501 U.S. 171, 177-78 (1991). The First Circuit stated that where the government crosses “the constitutionally significant divide from fact finder to adversary,” the right to counsel attaches. See, e.g., Roberts v. Maine, 48 F.3d 1287, 1291 (1st

Cir. 1995).

While the Supreme Court has not had occasion to rule directly either way on the applicability of the Sixth Amendment to arrests associated with individuals detained as “material witnesses” pursuant to 18 U.S.C. §3144, the United States Court of Appeals for the District of Columbia Circuit recently has. That court established a material witness’s Sixth Amendment right to counsel upon being charged pursuant to 18 U.S.C. §3144 in the high profile case of Center For National Security Studies, ET AL. v. United States Department of Justice, 2003 U.S. App. LEXIS 11910 (decided on June 17, 2003). In denying the balance of information about material witnesses sought by the Appellants in that case, the court partially relied on the fact that the material witness detainees had a Sixth Amendment right to counsel which had been recognized. It was stated therein that the “material witness detainees are free to retain counsel and have been provided court-appointed counsel if they cannot afford representation, *as required by the Sixth Amendment to the Constitution.*” (Emphasis added).

Additionally, “knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the States’s obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity.” Maine v. Moulton, 474 U.S. 159, 176 (1985); see also, Frye v. Commonwealth, 231 Va. 370, 391 (1986). Thus, even outside the context of the isolated interrogation room and the axiomatic “third degree”, newly arrested defendants often find themselves alone, without counsel, without rest, without food, or in other somewhat vulnerable states on which law enforcement may attempt to capitalize in their quest for a confession.

Further, it was established long ago that “the right to counsel does not depend on a

request by the defendant. Brewer v. Williams, 430 U.S. 387, 404 (1977); see also Carnley v. Cochran, 369 U.S. 506, 513 (1962). While an attached right to counsel may be waived by a defendant, courts indulge in every reasonable presumption against waiver, and waiving ones right to counsel requires not merely comprehension but relinquishment. Brewer v. Williams, *supra*. As established in Brewer, there need not be an interrogation, or even questioning, to establish a violation of the Sixth Amendment.

B. FACTUAL BASIS FOR SUPPRESSION

1. Lee Malvo's Sixth Amendment Right To Counsel Attached At His Initial Court Appearance On October 24, 2002

Lee Malvo had been arrested on October 24, 2002, in connection with shootings in the Washington, D.C. metropolitan area that resulted in an investigation unlike any previous. The same day he was brought to the United States District Court for the District of Maryland, Northern Division for his initial hearing. Judge Bredar established Lee Malvo's rights at that hearing on October 24, 2002, in the United States District Court, District of Baltimore, when he stated:

I also advise you that you have the right to be represented by an attorney at all stages of these proceedings and any related proceedings from this point forward. This means that you have the right to legal counsel during any questioning by the government, during any investigative proceedings and certainly during all future court appearances. "questioning by the government" and "investigative proceedings" are such critical stages.

(See Exhibit 7 at pp. 34-35). Counsel was appointed to represent Lee Malvo, and his appointed attorney even appeared at that hearing. His Sixth Amendment right to counsel was established, and, based on the actions of Judge Bredar was determined to have been asserted. In the presence of various government authorities (including representatives of the United States Marshal, the

Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco and Firearms), defense counsel's existence and identity were made known, along with Lee Malvo's intention to remain silent. There could be no doubt at the close of that hearing that Lee Malvo was represented by counsel and would *not* be speaking with authorities (See Exhibits 4 and 7 at pp. 34-35).

In addition, while the government claimed to be holding Lee Malvo as a material witness pursuant to the authority established in 18 U.S.C. §3144, during that initial appearance on October 24, 2002, Judge Bredar proceeded pursuant to Chapter 403 of the United States Code, that is, 18 U.S.C. §5031 *et seq.*, while focusing on 18 U.S.C. §5034. (See Exhibit 5). Pursuant to that Chapter, jurisdictional authority is based on juvenile acts of delinquency. There is no authority to proceed against a juvenile, or to detain a juvenile, as a material witness under §3144.

Subsequently, Lee Malvo was transported to the Super Max federal facility, where he was held at the time of his alleged statements made in response to questioning by Corrections Officers, Stracke and Davis. Super Max facilities are designed to house the most dangerous and violent criminals in the country – not people who are considered “witnesses.” There can be no mistake of the relative roles between Lee Malvo and the government authorities for Sixth Amendment purposes – the government was in a formal adversarial position relative to Lee Malvo.

2. Lee Malvo Asserted And Invoked His Sixth Amendment Right To Counsel

The United States Supreme Court has held that “if the police initiate interrogation after a defendant's assertion, at an arraignment *or similar proceeding*, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.” Michigan v. Jackson, 475 U.S. 625, 635 (1986) (emphasis added). Further, an assertion of the Sixth

Amendment right to counsel is not subject to the same threshold required in Fifth Amendment analysis. See Wilson v. Murray, 806 F.2d 1232, 1235 (4th Cir. 1986). In granting relief from a Habeas petition related to a Virginia state court proceeding, the court therein stated “[a] defendant’s statement that he *intends to arrange* representation is equivalent to a request for an attorney.” (Emphasis added).

Lee Malvo’s initial appearance was the functional equivalent of an arraignment at which time his right to counsel was acknowledged and honored. Lee Malvo accepted the court’s action appointing Mr. Treem to represent him, and actually relied on Mr. Treem during the same proceedings. Thus, it was improper for Stracke and Davis to attempt to elicit *any* statements from Lee Malvo, let alone to begin an interrogation.

3. Lee Malvo Did Not Waive His Sixth Amendment Right To Counsel, Did Not Initiate The Conversations With Davis and/or Stracke And Any Statements Made Must Be Suppressed

Lee Malvo maintained his silence and was not going to speak but for the fact that he was told he could not have what he wanted – *food* – unless he *asked for it*. Speaking was made a condition of Lee Malvo receiving a piece of the fish. By *only then* speaking to ask for food and making an offhand comment, Lee Malvo certainly did not waive his right to counsel, but regardless, any such waiver would be invalid because verbal communication was initiated, even induced, by Stracke and Davis. By responding to Lee Malvo’s rather innocuous initial comment with subsequent questioning the government agents only stepped further over the line. As such, the entire interrogation was improper and conducted in violation of Lee Malvo’s Sixth Amendment right to counsel. His statements therein should be suppressed on these additional grounds.

The facts in this situation are analogous to those in Brewer, supra. As did the defendant in that case, at the time he made the alleged incriminatory remarks, Lee Malvo had participated in court proceedings, had overtly relied on counsel, had his right to counsel explained to him and had implicitly asserted that right. The establishment and understanding of rights were even more poignant under Lee Malvo's circumstances since it was a Federal Magistrate Judge, in front of the prosecution and several government entities, who established them. Nonetheless, the similarities to the Brewer case do not end there. Subsequent to the assertion of Sixth Amendment rights, both defendants uttered inculpatory statements without having been advised of their continuing right to counsel, and without having executed or implied a knowing waiver of that right. Consistent with the decision in Brewer, the statements made by Lee Malvo should not be allowed in evidence.

As noted above in the Fifth Amendment argument herein, the fact that Stracke and Davis were Corrections Officers as opposed to police officers is irrelevant.

Respectfully submitted,
LEE BOYD MALVO

By 151
Co-Counsel

and

B 151
Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road
Suite 105
Springfield, VA 22151
703-323-1200
703-978-1040 (Fax)
VSB No: 20999

Craig S. Cooley, Esquire
3000 Idlewood Avenue
P. O. Box 7268
Richmond, VA 23221
804-358-2328
804-358-3947(Fax)
VSB No: 16593

CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was hand-delivered to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 21st day of July, 2003.

151
~~Co~~Counsel

151
Co-Counsel

EXHIBIT

tabbies

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE GRAND JURY SUBPOENA
(MATERIAL WITNESS)

: Misc. No. 02-3088 JKS-

: (Filed Under Seal)

...oOo...

MOTION FOR ISSUANCE OF MATERIAL WITNESS ARREST WARRANT

The United States of America, by and through its undersigned counsel, respectfully requests pursuant to 18 U.S.C. Section 3144, that the Court enter an Order commanding the United States marshal or any law enforcement agents to arrest Lee Boyd Malvo, and bring him forthwith before the District Court for the District of Maryland for the reason that said is a necessary and material witness in a proceeding before the Federal Grand Jury for the District of Maryland.

This motion is based upon the attached affidavit of Special Agent Scott Riordan and Special Agent Christopher Braga.

Respectfully submitted,

Thomas M. DiBiagio
United States Attorney

By: 151

A. David Copperthite
James M. Trusty
Assistant United States Attorneys
United States Courthouse, Suite 400
6500 Cherrywood Lane
Greenbelt, Maryland 20770-1249
301-344-4433

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

**IN RE GRAND JURY SUBPOENA
(MATERIAL WITNESS)**

: Misc. No. 02-3088 JKS
: (Filed Under Seal)
:

...oOo...

AFFIDAVIT IN SUPPORT OF ARREST WARRANT

1. I, coaffiant Special Agent Scott Riordan, am an agent with the Bureau of Alcohol, Tobacco, and Firearms, and have been so employed for 4 ½ years. I am working with the FBI on the investigation of shootings and homicides that have taken place in Montgomery and Prince George's Counties between October 2, 2002 and October 22, 2002 (hereinafter referred to as "Sniper Investigation"). Information contained herein is either directly known to me or has been provided by other law enforcement officers directly to affiant and/or through the review by affiant of official reports and transcripts concerning the events described.
2. I, coaffiant Special Agent Christopher R. Braga, am an agent with the Federal Bureau of Investigation. I am currently assigned to the Violent Crime-Major Offender's Squad, of the Baltimore Field Office. I have been employed by the FBI for 5 ½ years and am currently responsible for investigations of bank robbery, extortion, kidnapping, homicide on federal property and reservations, as well as other criminal matters.
3. At the request of Assistant United States Attorneys, A. David Copperthite and James M. Trusty, this affidavit is in support of a motion for a material witness warrant for a grand jury witness and sets forth facts supporting probable cause to believe the witness's testimony is material in a grand jury investigation regarding violations of 18 U.S.C. §§ 1951 and 924(j), a spree of killings and shootings in Maryland, Virginia and the District of Columbia, from October 2, 2002 through October 22, 2002 (hereinafter, the "Sniper Investigation"). Specifically, the witness Lee Boyd Malvo ("Malvo"), has firsthand information relating to a homicide that took place on September 21, 2002 in Montgomery, Alabama. The identification of persons related to that homicide, both witnesses and participants, is critical to the identification of person(s) involved in the shootings before the Grand Jury in Maryland. The witness Malvo, has been positively linked to the crime scene by the City of Montgomery Police Department and FBI through forensic evidence that will be described below.
4. Co-affiants have determined the following by directly communicating with agents and officers responsible for investigating the Montgomery, Alabama shooting. On September 21, 2002, at about 11:15 p.m. two individuals leaving the ABC Beverages Store at 2690 Zelda Road, Montgomery, Alabama were shot by an unknown assailant. One of the victims died from a gunshot wound to the torso, the other victim survived her injuries. When police arrived at the scene, a person fled the police arrival, dropping a firearms catalogue to the ground, which was recovered by police officers and submitted for latent fingerprint analysis. Fingerprint analysis has been conducted comparing the multiple latent fingerprints from the magazine to the known prints

of Malvo. A forensic expert has confirmed those fingerprints to be one and the same.

5. The Sniper Investigation consists of the following facts. On October 2, 2002, at 5:20 p.m., Montgomery County Police in Montgomery County, Maryland responded to 13850 Georgia Avenue for a shot fired through the window of Michael Craft's store. At approximately 6:04 p.m., on that date, at 2201 Randolph Road, in Wheaton, Maryland, a victim was shot in the back and killed. On October 3, 2002 at approximately 7:41 a.m., a victim was shot and killed while mowing the lawn at a car dealership at 11411 Rockville Pike, Kensington, Maryland. At approximately 8:12 a.m. on that date, at 4100 Aspen Hill Road, Rockville, Maryland, a victim was shot and killed while pumping gasoline. At approximately 8:37 a.m., on that date, a victim was shot and killed at 3701 Rossmoor Boulevard in Silver Spring, Maryland. On that date, at approximately 9:58 a.m., a victim was shot and killed at 10515 Connecticut Avenue, Kensington, Maryland. On that date at 9:20 p.m., a victim was shot and killed at 7700 Georgia Avenue, Washington, D.C. On October 4, 2002, at approximately 2:30 p.m., a victim was shot at 3102 Plank Road, Fredericksburg, Virginia. On October 7, 2002, a victim was shot at Benjamin Tasker Middle School located at 4901 Collington Avenue, Bowic, Maryland. On October 9, 2002, at approximately 8:18 p.m., a victim was shot at 7203 Sudley Road, Manassas, Virginia. On October 11, 2002, at approximately 9:30 a.m., a victim was shot at 5326 Jefferson-Davis Highway, Fredericksburg, Virginia. On October 14, 2002 at approximately 9:15 p.m. a victim was shot at the Home Depot store located at 6210 Arlington Boulevard, Arlington, Virginia. On October 19, 2002, at approximately 7:59 p.m. a man was shot in the abdomen while leaving the Ponderosa restaurant located at 6217 Seven Corners Center, Falls Church, Virginia. Finally, on October 22, 2002 at approximately 5:56 a.m., a victim was shot while standing inside a Ride-On bus located on Grand Pre Road in Silver Spring, Maryland. There is evidence that links these killings as related.

6. During the course of the Sniper Investigation, telephone calls taking credit for the sniper shootings were placed to law enforcement officials and to a private citizen. In these calls, the caller has made mention of his specific knowledge of the Montgomery, Alabama shooting, providing the exact neighborhood of the incident, referring to it as a liquor store robbery, and emphasizing his awareness of who actually participated in the shooting. The caller also indicates that the police should conduct ballistics testing of the bullet fragments in Montgomery, Alabama. Those calls also include specific identifying contents that match phrases left at three crime scenes within the Sniper Investigation. Specifically, the calls use phrases that appear on all three messages left for law enforcement at the scenes of shootings in Bowie, Maryland, Ashland, Virginia, and Silver Spring, Maryland. Those phrases were not released to the public.

7. Co-affiants believe that if a material witness arrest warrant is not issued at this time, Lee Boyd Malvo's testimony will probably be lost to the Grand Jury and will not be available in any subsequent criminal proceeding in the United States. Various law enforcement agencies associated with Sniper Investigation have made efforts to locate and question Malvo without success. Specifically, federal agents and local officers have been unable to find any addresses or employment information that would allow for interview of or service of process on Malvo. Further, Malvo is an alien who is currently pending an Immigration and Naturalization Service removal hearing in Washington State. Finally, Malvo's connection to the Montgomery, Alabama

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US DISTRICT COURT

crime scene suggests he is unlikely to voluntarily communicate with law enforcement. Malvo did not come forward to police and was identified by the forensic techniques mentioned above. It is not known whether Malvo directly or indirectly participated in the Montgomery, Alabama shooting, but his confirmed presence at the scene indicates that he has direct knowledge of that crime, and, based upon the communications received by law enforcement during Sniper Investigation, he is consequently a material witness critical to the identification of persons responsible for the sniper shootings in Maryland, Virginia and Washington, D.C. Under all of these circumstances, and based upon his potential involvement in the Montgomery, Alabama shooting, service of a grand jury subpoena, and simple reliance upon Malvo to appear, is impracticable.

8. Based on the above, affiant has probable cause to believe and does believe that is a material witness, as defined by Title 18, United States Code, Section 3144, in the investigation of the above-described investigation. Therefore, affiant requests the issuance of a warrant for the arrest of Lee Boyd ^MMalvo.

Further your affiant sayeth not:

151
Scott Riordan, A.T.F.

151
Christopher R. Braga, F.B.I.

Subscribed by recorded telephone conference, and
Subscribed before me this 23rd day of October, 2002:

151
Jillyn K. Schulze
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE GRAND JURY SUBPOENA
(MATERIAL WITNESS)

: Misc. No. 02-3088 JKS
:
:
: (Filed Under Seal)
...oOo...

MR. CLERK:

Please issue a Bench Warrant for the arrest of witness Lee Boyd Malvo. Based upon the nature of the investigation and the potential harm to this investigation by public disclosure, it is requested that the motion, this request, and the affidavit be sealed by the Court until such time as disclosure is warranted.

Respectfully submitted,

Thomas M. DiBiagio
United States Attorney

By: /s/
A. David Copperthite
James M. Trusty
Assistant United States Attorneys
United States Courthouse, Suite 400
6500 Cherrywood Lane
Greenbelt, Maryland 20770-1249
301-344-4433

ORDER

It is this 23rd day of October, 2002, hereby ORDERED, that a Bench Warrant be issued for the arrest of the above-named witness as prayed, and that this order, the attached affidavit, and the attached motion be sealed with three copies provided to the United States Attorney's Office.

/s/
Jillyn K. Schulze
United States Magistrate Judge
U.S. District Court for the
District of Maryland

MEMORANDUM OF INTERVIEW**10-24-02****Det. T. Ryan****09:40 hours****Malvo, Lee Boyd****MCP / #12****B/M 02-18-85****No fixed address**

This interview was conducted at the MCP Family Services Division, an off-site facility located in the Calhoun Business park in Rockville. The interview was conducted incident to the arrest of Mr. Malvo in Myersville MD. In advance of the interview, Mr. Malvo was placed in a secured, designated interview room. Moments after, Mr. Malvo attempted to escape by accessing the ceiling. Mr. Malvo was forcibly removed from the ceiling and restrained by task force officers. Mr. Malvo was then placed in a holding cell for a period prior to returning to the interview room. Prior to the escape event, Mr. Malvo failed to verbally respond to questions related to his detention and arrest procedures. The writer conducted the interview while other task force officers monitored.

The subject did not verbalize any communication during the interview. The writer noted that after the escape attempt, Mr. Malvo did respond verbally, establishing that he was able to speak and hear. The subject did communicate extensively during the interview through gestures and tracing words and short sentences on the table surface and wall. The second phase of the interview is video taped.

The writer asked the subject if he knew why he was arrested. In response the subject nodded in the affirmative and the writer explained that it was necessary that he communicate to complete processing. The subject gestured with fingers to lips, a zipper motion repeatedly. The subject indicated that he elected not speak in the event of his arrest.

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The writer asked the subject if he was aware of his constitutional right to remain silent and access to counsel. The subject smiled in response and nodded in the affirmative. The writer explained that certain forms including advice of rights would be completed that required his signature. In response, the subject made a crumbling gesture and throwing motion. The subject refused to write or sign anything. In response to explain the charges and proceedings, the subject began pressing and rolling his thumb on the table top, the writer stated your finger prints from the Canadian border stop. The subject also communicated the following thoughts:

I understand my rights

The police want to know about my thoughts

The police are trying to get what he's thinking

Repeatedly making a noose and hanging gesture

The writer asked the subject if he intended to hurt himself, in response he shrugged his shoulders and appeared non-committal. The writer stated that a great deal of evidence was recovered in the Monday event involving the bus driver. The writer added that the police know that something happened that caused him to leave things behind with the note. The subject nodded in the affirmative and his eyes welled with tears. The subject gathered the collar of his coveralls and began to rock in the chair. The writer stated that Massaponx was crazy with the road blocks, I bet you guys were surprised. In response the subject nodded in the affirmative and laughed. The writer stated that police contacts on October 2nd and 3rd placed them in the area of the events, the subject nodded in the affirmative. The writer stated that you must have known that would be a problem, the subject did not respond. The writer stated that it must have been frustrating attempting to reach the police, in response the subject nodded negative. The writer asked the subject if he was a Muslim, the subject nodded in the affirmative. The writer asked Mr. Malvo if he followed the teachings of the Koran, he gestured a striking motion to the

center of the chest and nodded in the affirmative. The writer asked why he chose to call the priest in Virginia. In response, the subject begins tapping his ear repeatedly. The stated because he would listen, the subject pointed at the writer and nodded repeatedly in the affirmative. The writer asked was it about the money, in response the subject gestured, rubbing his index and middle finger with the thumb, nodding in the negative. The writer asked am I missing it. The subject then placed his hand, midline from the chest, then placed the hand at a higher level. The subject struck his chest several times while nodding in the affirmative. The writer asked if it was about something bigger than the money, in response the subject nodded in the affirmative. The writer then stated so it's a little about the money, in response the subject gestured by rubbing the fingers with one hand, tilting the other hand left to right repeatedly and nodded in the affirmative. The subject then gestures that the writer is trying to get into his head. The subject then traces three circular shapes in air, each larger than the previous. The writer stated that it's bigger and bigger, the subject nodded in the affirmative. The subject then gestured that the head would explode, accompanied by a an exploding sound. The subject tapped his head and then made a gesture of turning a key at his forehead. The writer asked if the gesture meant that the information was locked away, he did not respond. The subject then gestured the dealing of cards on the table and waved his arm over the table in a sweeping motion. The subject would repeat this gesture periodically during the interview. In response the writer asked if the subject was referring to the tarot cards, he shrugged his shoulders and smiled. The writer asked about the origin of the vehicle, in response the subject made a rolling hand gesture.

The writer asked Mr. Malvo if he was not speaking for fear of voice recording comparisons, in response, he shrugged his shoulders. The subject tapped his head several times and

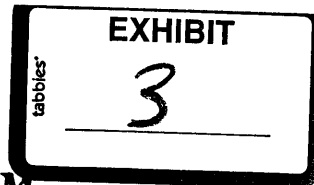
then begins scratching the edge of the table repeatedly. The subject motioned for the writer to move closer and then displayed his thumbs and index fingers together, forming a diamond shape. The subject then collapsed the diamond shape and began scratching the edge of the table again, followed by the collapsed diamond shape. The writer asked he was concerned that I would through the wall, he nodded in the negative and waved his arm left to right repeatedly. The writer then asked you mean I can't get through, in response the subject smiled and nodded in the affirmative.

The subject indicated a need to use the restroom. The writer asked if he would like something to eat, he responded by tracing words. Eat one time was spelled out, the subject indicated that he consumed one meal per day in the evening. The subject accepted an offer for bottled water. The subject made a circular motion with his index finger next to his head, the writer responded no I don't think you are crazy.

This phase of the interview concluded at approximately 11:10 hours for a restroom break. The interview resumed at approximately 13:13 hours and was video taped



Department of Police
Montgomery County, Maryland



MCP 50
Rev. 02/01

ADVICE OF RIGHTS FORM

CR #:

PERSON TO BE INTERVIEWED: MALVO, LEE
(Last) (First) (Middle)

LOCATION OF INTERVIEW: MCP, FSD

DATE OF BIRTH: _____ PHYSICAL CONDITION: _____ SOBRIETY: _____

MEDICATION: _____ EDUCATION LEVEL: _____

TIME ADVICE OF RIGHTS FORM READ: _____ DATE: 10.24.02

LANGUAGES: REFUSED TO SPEAK

1. You have the right now and at any time to remain silent.
2. Anything you say may be used against you.
3. You have the right to a lawyer before and during any questioning.
4. If you cannot afford a lawyer, one will be appointed for you.
5. Do you understand what I have just said? Answer: NOD, AFIRM
6. Do you want to talk to us? Answer: SIDE TO SIDE, NO

151
Officer/ID #

Refused
Signature of Person Advised

11:30
Time Form Signed

Officers/Persons Present: _____

Function Code: 513
CALEA: 42.2.2, 42.2.3
Proponent Unit: ISB, FSB Admin.

Distribution: Original: Officer
Yellow: Defendant
Pink: State's Attorney

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SERIALIZED

Initial Appearance
Appointment of Counsel
Appointment of Guardian Ad Litem

Page 1

EXHIBIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

In Re)	
Alleged Material Witness)	
JUVENILE)	Criminal Docket No. Not Yet Assigned
(Lee Boyd Malvo))	(Later Assigned as 02-0474)
)	

Baltimore, Maryland
October 24, 2002
2:55 PM to 5:01 PM

The above-entitled matter came on before
The Honorable James K. Bredar

A P P E A R A N C E S

On Behalf of the Government:
A. David Copperthite, Assistant U.S. Attorney
James M. Trusty, Assistant U.S. Attorney

On Behalf of the Alleged Material Witness:
Joshua R. Treem, Esquire
Andrew Jay Graham, Esquire, Guardian Ad Litem
Max Higgins Lauten, Esquire, Guardian Ad Litem

ALSO PRESENT

Donald Donovan, Chief Deputy Marshal
William Henry, Chief, U.S. Probation & Pretrial Services
Barbara Skidmore, Deputy Chief, Pretrial Services Officer
Trent Cornich, Pretrial Services Officer
Kenneth Langston, Pretrial Services Officer
FBI Special Agent Christopher Braga
ATF Special Agent Scott Riordan

Sharon Cook, Official Court Reporter, U.S. District Court

seated at the defense table. As I indicated, he is in a dark-green jumpsuit and a white T-shirt.

Mr. Copperthite, is this the person that you and your colleagues from the government have brought to court today in relation to these proceedings and who is the subject of these proceedings?

MR. COPPERTHITE: Yes, it is, Your Honor.

THE COURT: All right. Let me continue with the identification of the persons who are present.

My Courtroom Deputy Clerk, Mr. Howard Goldsmith, is seated before me.

The Court Reporter, Ms. Sharon Cook, is taking these proceedings down stenographically.

And, last of all, my law clerk, Mr. Tom James.

Mr. Copperthite, do you agree, obviously in addition to myself, that I have now identified every person who is in the courtroom?

MR. COPPERTHITE: Yes, I do, Your Honor.

THE COURT: Does the government have any objection to the presence of any person who is currently in the courtroom?

MR. COPPERTHITE: No, sir.

THE COURT: Very well.

Now, determining as I have that we should conduct these proceedings in accordance with the statute set out for juvenile delinquency matters, I am turning to section 5034 of

Title 18 of the United States Code.

I would ask, Mr. Copperthite, if you could, to elaborate on your contention that the person who is here in court with us and that is the subject of these proceedings is a juvenile. Why do you believe that?

MR. COPPERTHITE: Just one moment. If you would bear with me, Your Honor.

THE COURT: That would mean that this is a person who as of today has not yet reached his 18th birthday.

(Pause in the proceeding.)

MR. COPPERTHITE: He has not reached his 18th birthday, Your Honor. He has a date of birth of February 18, 1985.

THE COURT: And if you would elaborate on that proffer. Why do you believe that that is true?

MR. COPPERTHITE: Your Honor, the agents have had the opportunity to identify him through fingerprints and other means of identification.

THE COURT: Okay. Then let's proceed one further step. To the extent that you believe the government has done that successfully, who does the government believe this person to be?

MR. COPPERTHITE: This person is Lee, middle name Boyd, B-o-y-d, Malvo.

THE COURT: Lee Boyd, B-o-y-d. And the last name is?

and have been for many years. You are a named partner in a Criminal Justice Act Felony Panel, you are a named partner in a prominent Baltimore, Maryland law firm, and you are someone I deem to be fit to serve in this capacity if you are willing to do so. Are you willing to serve as the guardian ad litem of the person seated in the courtroom whom we believe to be the juvenile Lee Boyd Malvo?

MR. GRAHAM: Yes, Your Honor.

THE COURT: And I take it you are accompanied by your partner?

MR. GRAHAM: Max Lauten.

THE COURT: And it would be your intention that Mr. Lauten would assist you in the performance of your guardianship in this regard; is that right?

MR. GRAHAM: That is correct, Your Honor.

THE COURT: I'm not sure whether it is technically necessary to make Mr. Lauten a co-guardian, but it will clearly be the Court's understanding that with Mr. Graham the primary appointee, the two of you are authorized to function in that capacity from our standpoint.

If you would please come up to the table.

(Mr. Graham and Mr. Lauten complied.)

THE COURT: What we are going to do next is to conduct what we would normally refer to as an initial appearance, but we are not going to do that immediately because certain matters

must be inquired into during the initial appearance. In order for the alleged material witness to offer answers to the questions that are going to be put to him, offer them with the benefit of appropriate advice from his guardian, we are going to take a recess to allow the guardian and Mr. Lauten to meet with this person.

Mr. Marshal, where would be the most convenient place to conduct that discussion, back in the general lockup facility of the courthouse or on this level, and do you want the guardians to go with him at this point or meet him somewhere else?

CHIEF DEPUTY MARSHAL DONOVAN: Your Honor, I would suggest the attorney conference room in our cell block on the sixth floor.

THE COURT: Very well. Then I am going to remand the person I believe to be Mr. Malvo to the custody of the United States Marshal, there having been at least a first appearance if not technically an initial appearance here in federal court, to be taken to the sixth floor, at which location the Marshal shall facilitate a conference between the court-appointed guardian ad litem and Mr. Lauten and Mr. Malvo.

Mr. Graham, if you would advise the Marshals when your conference has concluded and you are ready for the commencement of the initial appearance.

MR. GRAHAM: All right, Your Honor. Thank you.

in subparagraph (B)?

all employees of the Government connected with the case, including ... employees of the court; the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding;

MR. LAUTEN: Your Honor, there is no defendant that we know of.

THE COURT: Right. The question is whether I am going to say that inferentially he is in the same status here.

keep all documents that disclose the name or any other information concerning a child in a secure place ...

This is guidance only, but, the witness being a juvenile, I am going to enter an order restricting his guardians and Mr. Treem, who -- Mr. Treem, you have been appointed -- who was appointed before he came into the courtroom in this case, and the restrictions that are placed on Mr. Graham and Mr. Lauten and Mr. Treem are those that are set out in Title 18 of the United States Code Section 3509(d)(1).

To explain my order, all of these attorneys have been appointed at the direction of the Court, none of them at the request of the witness who is here, whom I believe to be under

I note that my colleague, Cabbies Judge Schulze, having reviewed all of this, did find that sufficient probable cause had been shown to indicate that he was a material witness.

Mr. Malvo, do you understand what I have explained to you about the allegations, that you are a material witness in relation to certain violations of 18 U.S.C. Sections 1951 and 924(j), involving a spree of shootings and killings in Maryland, Virginia, and the District of Columbia between October 2, 2002 and October 22, 2002? Do you understand that, sir?

There is no response whatsoever from the witness. For the record, he is staring with his eyes open, but otherwise with an expressionless face.

Mr. Graham, do you understand?

MR. GRAHAM: I understand that that is what the affidavit seems to allege.

THE COURT: Okay. Now, Mr. Malvo, I am going to advise you that being in the custody of law enforcement, you have the right to remain silent, that you are not required to make any statement, and that anything you do say may be used against you in future court proceedings.

I also advise you that you have the right to be represented by an attorney at all stages of these proceedings and any related proceedings from this point forward. This

means that you have the right to legal counsel during any questioning by the government, during any investigative proceedings, and certainly during all future court appearances. If you cannot afford an attorney, one will be appointed for you, to be paid for by the government, without any cost to you.

Mr. Malvo, do you understand your right to remain silent?

There is no response from Mr. Malvo, although his eyes are open and he is looking directly at me.

Mr. Graham, as guardian, do you understand your ward's right to remain silent?

MR. GRAHAM: Yes, Your Honor.

THE COURT: Mr. Malvo, do you understand your right to legal counsel in this matter?

Again, there is no response whatsoever from the witness.

Mr. Graham, as guardian, do you understand your ward's right to legal counsel?

MR. GRAHAM: Yes, Your Honor.

THE COURT: This is the point at which I would place the witness under oath in order to make certain inquiries of him pertaining to his identity, --

(Gregory Welsh, First Assistant U.S. Attorney, then entered the courtroom and conferred with Mr. Copperthite and Mr. Trusty.)

THE COURT: -- and to ascertain whether he wishes counsel to be appointed for him, and whether he qualifies for the appointment of legal counsel. --

Mr. Malvo, are you prepared to raise your right hand and take an oath to tell the truth and answer certain questions at this time?

There is no positive response. Mr. Malvo continues to look at me. He is clearly awake and is --

(Mr. Welsh then left the courtroom.)

THE COURT: -- standing on his own. His eyes are open, and his face is expressionless.

That is a question, Mr. Graham, which I do not believe you are able to answer or really contribute to on behalf of your ward.

In light of the fact that Mr. Malvo is completely nonresponsive in this proceeding, I am going to conclude, based on the information that has been proffered here in the court and the somewhat unusual circumstances, that he is indigent and unable to retain legal counsel on his own.

Mr. Graham, do you have any reason to believe otherwise?

MR. GRAHAM: No, I don't.

THE COURT: Based on all of that and Mr. Graham's views, I am going to go ahead and appoint legal counsel to represent the defendant under the Criminal Justice Act. I have

done that informally already, and Mr. Joshua Treem of this Court's Felony Criminal Justice Act Panel has been in the courtroom now for some time.

Mr. Treem, are you available to accept representation to represent Mr. Malvo, with Mr. Graham and Mr. Lauten as his guardians ad litem?

MR. TREEM: Yes, Your Honor.

THE COURT: Very well.

Mr. Copperthite, of what nation do you believe the defendant to be a citizen or national?

~~MR. COPPERTHITE: We obtained the witness' case file~~
from INS, Your Honor. He was born in Jamaica and is a Jamaican national.

THE COURT: He is not a naturalized United States citizen, to your knowledge?

MR. COPPERTHITE: He is not.

THE COURT: All right. Do you know -- I am not in my normal courtroom where I have my handy-dandy chart. Do you happen to know whether Jamaica is a mandatory or nonmandatory consular-notification nation?

MR. COPPERTHITE: We have complied with Jamaica either way.

THE COURT: All right. In other words, you have made notification?

MR. COPPERTHITE: That is correct, although it is not

required.

THE COURT: It is not mandatory?

MR. COPPERTHITE: It is not mandatory.

THE COURT: Okay. The treaty nonetheless requires this Court at his first appearance to advise him, and I will do so.

Mr. Malvo, I don't have the formal language of the treaty in front of me, but I think I can paraphrase it satisfactorily. I have been advised that you are a national of Jamaica and not of the United States. It is my belief, upon proffer from the government, that under the Consular Treaty existing between Jamaica and the United States, the Government of the United States is not required to notify the Government of Jamaica that you are in custody here. However, this Court and the Government absolutely will notify the Government of Jamaica as to the fact that you have been arrested and detained here if you wish us to do so.

The advisement, as I recall it, requires me to point out to you that consular officials from your country could be of assistance to you in that they may notify your family members that you are in custody in the United States, and they may be able to assist you in obtaining legal counsel in this case.

Mr. Malvo, do you request that the Jamaican consular officials be notified of your current detention in this

district?

There is no response from Mr. Malvo. His eyes are open, and he is looking at me, but he has made no response.

Mr. Graham, do you feel comfortable answering that inquiry on behalf of your ward?

MR. GRAHAM: No, Your Honor, I really don't. I am not sure whether it would in his best interest or not for the Jamaica officials to be notified, so I can only take no position on that.

THE COURT: Thank you, Mr. Graham.

~~Out of an abundance of caution, Mr. Copperthite, and~~
regardless of what the government may have already done, in light of these unusual circumstances with the witness not speaking, he is in detention, and I am going to order the government to notify consular authorities in the United States representing Jamaica that the witness is in official detention in this county.

Will you discharge that responsibility, Mr. Copperthite?

MR. COPPERTHITE: Yes, Your Honor.

THE COURT: We will next turn to Title 18 United States Code Section 3144.

(Pause in the proceeding.)

THE COURT: As far as I am concerned, the first four-fifths of the first section of this section have already

occurred by virtue of Chief Magistrate Judge Schulze reviewing an affidavit earlier today and issuing an arrest warrant for Mr. Malvo.

The statute next commands that he be treated in accordance with the provisions of section 3142, which is the very familiar regimen under which courts consider whether to detain or release persons who are brought in in custody. However, there are additional requirements here. I'll quote from the statute.

No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

What I have decided is that the appropriate way to handle this is to first march through section 3142, and only in the event that I conclude, should there be a motion, that the defendant should be detained, will I then turn to the question of whether a deposition could be conducted, and, thus, eliminate the need for detention in this case. But I think

that is premature before I decide whether there even needs to be detention here. And I am commanded to comply with 3142.

So, that is where we will begin, Mr. Copperthite. The question is, does the government contend that the witness, Mr. Malvo, is either a flight risk or that there are somehow statutory circumstances present that would make him a candidate for detention because he is dangerous, although I have a hard time imagining how that could legally be possible given the normal statutory prerequisites to detaining a person on dangerousness grounds. In other words, they have to be charged with certain offenses, and you have to make certain allegations, and so forth. But perhaps we can push that aside for a moment and just address the question of whether or not the government contends that this defendant is a flight risk.

MR. COPPERTHITE: Yes, Your Honor, the government does.

THE COURT: Okay. Now, in order for the Court to order that a detention hearing be held at some point in the future in this matter, this Court has concluded that it is necessary for the government to make a proffer to demonstrate that there is a serious risk that the person might flee.

Are you prepared to make such a proffer at this time, before I make a decision as to whether or not there will be a detention hearing?

MR. COPPERTHITE: Yes, Your Honor.

THE COURT: What is your proffer?

MR. COPPERTHITE: The proffer would begin by advising the Court that the witness, Mr. Malvo, is currently on a bond from the Immigration and Naturalization Service and that that bond was for illegal entry into the country.

I reviewed Mr. Malvo's base file from the Immigration and Naturalization Service, and two of the conditions of his bond was that he not leave the state of Washington, where the bond was set. Mr. Malvo, as you know from today, was arrested in Maryland, Your Honor, without the permission of INS to leave the state of Washington.

The image shows a document page where the text has been redacted. There are approximately 15 horizontal black bars of varying lengths covering the text. The bars are thick and solid black, making the original content completely illegible. The redaction covers the majority of the page, leaving only the top and bottom margins visible.

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: All right. Well, let me stop you there and ask Mr. Treem whether or not he contends there is not a serious risk that the defendant will flee within the meaning of the Bail Reform Act such that the government is not entitled to a detention hearing in this matter.

Do you have any such argument, Mr. Treem, at this time?

MR. TREEM: Your Honor, very frankly, I don't think I am in a position to comment either way. I have not had any opportunity to speak with Mr. Malvo, or with Mr. Graham or Mr. Lauten substantively in their capacity, so I am not going to answer the Court's question, with all due respect.

THE COURT: Then it might be appropriate to -- why don't we take a brief opportunity here to ascertain whether it would be fruitful for the Court to take a recess to allow such

a discussion to occur. Why don't you speak to Mr. Malvo and Mr. Graham for a minute, outside of everyone else's hearing, and then be able to advise the Court as to whether you request a brief recess so that you can have a discussion.

The other thing that I think should be taken up at this time, Mr. Treem and Mr. Graham, with your ward and client respectively, is the question of whether he is prepared to meet with a Pretrial Services Officer from this court so that they can conduct an interview of him and prepare a Pretrial Services Report to better inform me on the question of whether or not he is a flight risk.

We will go off the record for a moment and allow the four of you to confer in private but here in the courtroom.

(At 4:45 p.m., the conference commenced.)

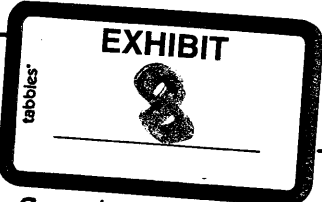
(At 4:48 p.m., the conference concluded.)

THE COURT: Mr. Treem, I guess the first question is, is your client, together with his guardian, prepared to sit down and meet with the Pretrial Services Agency of this court so that they can interview him and prepare a Pretrial Release Report?

MR. TREEM: The answer to that would be no, Your Honor.

THE COURT: Okay. Then we are not going to take a recess to cause that to occur.

Now, going back to the question of whether you

your client have any health, medical,  -drug issues which you wish to bring to the Court's attention at this time before he is remanded to custody?

MR. TREEM: Your Honor, I have not had the opportunity to make that inquiry. I have been advised by Mr. Lauten that the inquiry was made and there was no response. So, I have nothing to add to that.

THE COURT: Okay. Well, this is the sort of thing that -- I have found that the defendant understands what is occurring here, and that he, by definition, then understands what I have just stated. So, I have no basis for entering a medical order and will not do so at this time.

MR. TREEM: Your Honor, can I just make one comment?

THE COURT: Yes, Mr. Treem.

MR. TREEM: Given the conditions that you have placed on where Mr. Malvo will be I guess temporarily detained and without knowing where the Marshals might wind up housing Mr. Malvo, I would just put on the record my belief that none of these conditions could be satisfied by putting him at SuperMax under any circumstances. If that is where he winds up, I would object to that on the record now.

THE COURT: All right. Your objection is noted.

The government has not stated for the record that that is the place where he will be held. The Court is not going to get into approving or disapproving particular facilities.